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May 22, 2008

Mr. Dirk Kempthorne
Secretary of the Interior
United States Department of Interior
Natural Resource Damage Assessment and
Restoration Program
Mail Stop 3548
1849 C Street, NW
Washington, D.C. 20240

Re: Proposed Regulation Changes Regarding Natural Resource Damage Assessments

Dear Secretary Kempthorne:

The New Mexico Attorney General, on behalf of the Natural Resources Trustee for New Mexico, the New Mexico Office of Natural Resources Trustee (NMONRT), and the State of New Mexico, submits the following comments in response to the proposed modifications to regulations governing natural resource damage assessments. The proposed rule changes were published in the February 29, 2008 Federal Register.

As the designated trustee for New Mexico's natural resources, NMONRT has conducted numerous Natural Resource Damage Assessments (NRDAs) at a variety of sites throughout our state. NMONRT uses the damage assessment process set forth in 43 CFR Part 11 in its efforts to achieve out-of-court collaborative resolution of its NRD claims against Responsible Parties.

The proposed changes to the regulations governing the NRDA process raise legal and practical concerns in several areas. We urge the Department of Interior to address these concerns prior to final promulgation of any regulatory changes. These areas of concern are set forth below.

I. The Proposed Regulatory Changes Place Undue Emphasis on Restoration to "Baseline Level of Services."

In a purported effort to follow the directives of the Court of Appeals for the D.C. Circuit in the *Kennecott* decision, the proposed regulations go too far in emphasizing that NRD restoration need only restore to the "baseline level of services" provided by the

damaged resource. *See, e.g.* proposed revisions to §§ 11.38, 11.80, 11.83, *inter alia*. The Court in *Kennecott* expressed concern that existing regulations may allow double recovery of damages by requiring *both* restoration of a resource *and* restoration of that resource's services. The Court did not, however, direct DOI to exclude—as the current proposed regulations appear to do—any possibility of requiring actual resource-based (as opposed to service-based) restoration of the injured resource.

The proposed substitution of all references to "restoration of resources" with language specifying that "restoration" need only be to that resource's "baseline level of services" potentially contravenes the clear dictates of CERCLA as set forth in *Ohio v. U.S. Dept. of Interior*, 880 F.2d 432 (D.C. Cir. 1989). In *Ohio*, the Court drew upon an exhaustive review of the legislative text and history of CERCLA in rejecting a regulatory scheme that allowed for damages to be based solely on the "diminution of use values" of the damaged resource. 880 F.2d at 441-459. The Court concluded that such an approach conflicted with Congress' clear preference for restoration of damaged resources. *Id.*

The Court in *Ohio* illustrated the problem with using "diminution of use values" as the measure of damages with the example of a hazardous substance spill that kills a rookery of fur seals and destroys a habitat for seabirds. 880 F.2d at 442. Under a "diminution of use values" approach, the damages in such a case would be limited to the market value of the seal pelts and the per-acre price of land for the seabird habitat. *Id.* Because this value would likely be "far less than the cost of restoring the rookery and seabird habitat," it reflected a result that was "directly contrary to the expressed intent of Congress." *Id.*

In providing only for "restoration" to the "baseline level of services," the proposed regulations open the door for a return to a damage assessment regime similar to that stricken by the Court in *Ohio*. An exclusive focus on service-based standards for restoration may impermissibly require, for example, that a Responsible Party only provide "services" in the form of "seal pelts" rather than adequate "restoration" of the seal rookery. The proposed regulations beg the question of whether restoring "baseline level of services" necessarily encompasses more than restoration of lost "use values."

The limitation of NRD recovery to restoration to "baseline level of services" also appears targeted to exclude those sites where damages are to groundwater. Responsible parties, particularly federal responsible parties, have recently suggested that instances of groundwater contamination—even substantial contamination—are not subject to NRD recovery where the injured groundwater provides no "services." New Mexico vigorously contests this position on two counts. First, as a matter of well-established public policy in New Mexico, *all* groundwater in New Mexico—even that which is not immediately subject to use—is a valuable resource for the residents of our arid state. *See, e.g.* N.M. Stat. Ann. §§ 72-12-1--28; 72-5A-2 (1978). Second, barring recovery for groundwater contamination based on the dubious allegation that certain bodies of groundwater hold no service value directly contravenes CERLCA's command that those responsible for damage to a natural resource must restore that resource, regardless of any question of its "service value." Congress did not limit the requirements at 42 U.S.C. § 9607(a)(4)(C) to only those damaged resources that provide "services."

DOI could readily address these concerns. First, the regulations should be altered to clarify that actual resource-based restoration is expressly permitted, particularly where measures of "baseline services" may not fully reflect the damage to the resource. Second, in this context, DOI should give emphasis to the fact that "baseline level of services" reflects the entire range of services reflected in § 11.71(e), including the "provision of habitat, food, and other needs of biological resources."

II. The Proposed Changes May Improperly Limit Certain Valuation Methods.

The proposed changes evince a clear intent to limit, at the risk of impermissibly excluding, the use of certain valuation methodologies. They do so through changes that, taken together, improperly threaten a trustee's ability to assess fully the extent of natural resource damages. Congress "intended the damage assessment regulations to capture fully all aspects of loss," and called for rules governing the assessment process to provide trustees with "a choice of acceptable damage assessment methodologies to be employed," giving trustees the ability to use the "most accurate and credible damage assessment methodologies available." *Ohio v. U.S. Dept. of Interior*, 880 F.2d 432, 463 (D.C. Cir. 1989).

DOI cannot properly promulgate regulations that have the effect of arbitrarily prohibiting a trustee from use of a given methodology. *Id.* at 462-64. The proposed changes to 43 CFR 11.83(c) "explicitly authorize trustees to use the cost of restoration actions that address service losses to calculate all damages, including interim losses." 73 Fed. Reg. 11083 (Feb. 29, 2008). DOI expresses a preference for the "restoration-based" approach, noting that "[m]ethodologies that compare losses arising from resource injury to gains expected from restoration actions are frequently simpler and more transparent than methodologies used to measure the economic value of losses." *Id.*

This proposed change seemingly offers trustees a welcomed alternative method—to be used at the trustee's discretion—for determining compensable value. As a practical matter, however, the proposed changes may actually foreclose a trustee's ability to use anything but the alternative "restoration-based" method. As the preamble explains, the Department's regulations "do not sanction or bar the use of any particular methodology so long as it complies with the 'acceptance criteria' for relevance that appear in the rule." *Id.* In other words, methodologies that don't fare well when measured by the "acceptance criteria" are potentially barred, while those that do, are, in effect, sanctioned. Not coincidentally, however, this change is accompanied by a variety of changes to the "acceptance criteria."

First, the requirement at § 11.83(a)(3) that "[o]nly those methodologies that are feasible and reliable for a particular incident and type of damage" is singled out as an overarching, mandatory criterion as distinct from the several listed criteria that follow that "may or may not be applicable to every case." The increased prominence of this particular requirement is problematic. Due to the highly unique nature of the incidents and damage types encountered by trustees and the fact that many methodologies are relatively new, a given valuation methodology may well not have a track record for a

"particular" damage or incident type. For this reason, we urge you to include the requirement for incident-specific suitability as among the non-mandatory factors—listed in § 11.83(a)(3)(i) through (x)—to be considered. Alternatively, methodologies should be allowed to the extent they are "generally applicable" to a given category of incidents.

Second, the proposed regulations add to the "acceptance criteria" *Daubert*-like standards that, for the same reasons suggested above, will often either be inapplicable or unduly limiting. For example, the requirements proposed in § 11.83(a)(3)(vi) through (x) impose unrealistic standards for valuation methodologies in the NRD context: peer review; "general or widespread acceptance;" a set of standards governing the use of a methodology; previous testing or analysis of the methodology, etc. These purported indicia of reliability do not fit well in the NRDA context. Many methodologies are relatively new and have not been subject to peer review, or have not been subject to peer review in a context that is analogous to a particularized NRD incident. Likewise, the expert community in the field of NRDA is very much divided—in biases—between those that work with and favor industry and those that work with and favor trustees. Thus, "general" or "widespread" acceptance for a particular methodology will nearly always be unattainable. Even though the proposed regulations acknowledge that such criteria "may not be applicable to every case," the net effect is to narrow the scope of methodologies available to trustees. Again, we urge the imposition of general standards that are better suited to this field, emphasizing, for example, the use of methodologies that are rooted in or derive from generally accepted principles.

Finally, the proposed regulations include a table that imposes undue limits on a trustee's ability to use specific methodologies. For example, according to the table, a trustee may use a "market price" methodology "only" where the "natural resources are traded in the market" and that market is "reasonably competitive." 73 Fed. Reg. 11087 (Feb. 29, 2008). This seemingly forecloses use of market prices in cases where an immediate market for the resource in question may be limited, but markets in other regions may still offer useful price references. Similarly restrictive language is applied to the use of a "factor income" methodology. DOI should change this language to make it less restrictive, by, for example, suggesting (as opposed to requiring) that a methodology only be used when particular circumstances—or reasonably equivalent circumstances—are present.

We appreciate your careful consideration of these comments and ask that you revisit the proposed changes to address the concerns we have raised.

Sincerely,

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New Mexico Attorney General

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